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No. 516

In the Supreme Court of the United States

OCTOBER TERM, 1952

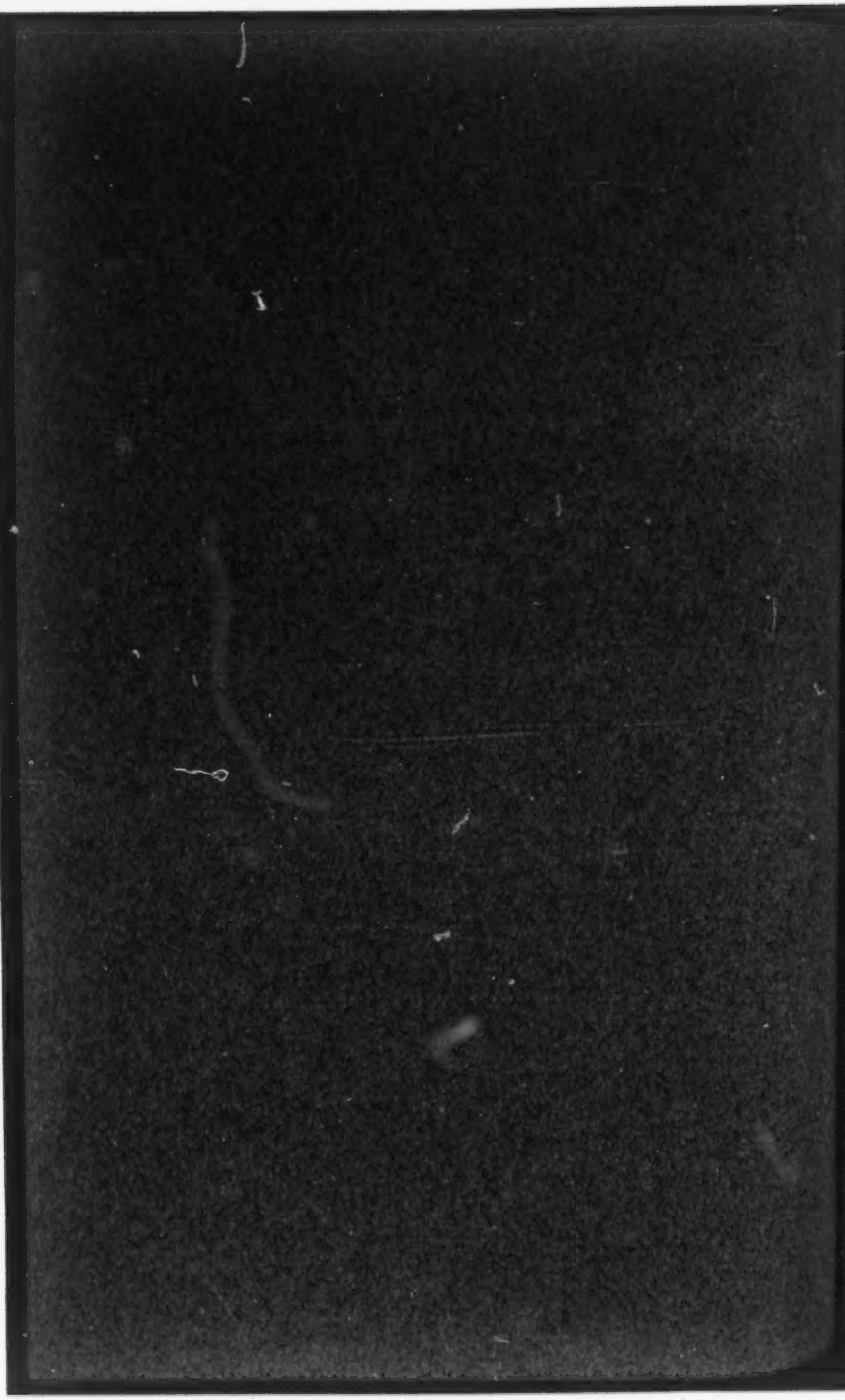
BEACON BRO. BOX COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES



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OPINIONS BELOW

The opinion of the District Court (R. 20–22) is not reported. The opinion of the Circuit Court of Appeals (R. 85–97) is reported in 60 F. (2d) 944.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 1, 1932. (R. 97–98.) A petition for rehearing was denied September 30, 1932. (R. 102.) The petition for a writ of cer-

tiorari was filed November 19, 1932, and granted January 23, 1933. (R. 103.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether claims for refund (of taxes paid for 1918 and 1919) as originally filed by the taxpayer were sufficient to support a suit on the ground that invested capital had not been properly valued.

2. If the claims as originally filed were not sufficient to support a suit on that ground, whether they could be effectively amended after the statute of limitations had expired.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra*, pp. 29–33.

STATEMENT

This is an action brought to recover income and excess profits taxes paid by the petitioner for the years 1918 and 1919. The action was tried in the District Court without a jury on an agreed statement of facts. (R. 10–15.) The facts may be summarized as follows:

On May 15, 1919, the petitioner filed its completed corporation income and profits tax return for the calendar year 1918, and the tax shown as due was paid during the year. The Commissioner of Internal Revenue later assessed a deficiency for

1918, and this was paid on June 30, 1920, and May 18, 1922. (R. 10–11.)

On March 13, 1920, the petitioner filed its tax return for 1919 and the tax shown thereon was paid during the year. The Commissioner later assessed a deficiency for 1919, which the petitioner paid on December 16, 1920. (R. 11.)

On February 29, 1924, the petitioner filed a claim for refund of part of the taxes paid by it for 1918 (R. 11); and on December 12, 1924, it filed a claim for refund of part of the taxes paid for 1919 (R. 11–12).

The grounds of the refund claims were the same in each instance. Each claim asserted that the excess profits tax and the war profits tax for the respective years "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918"; and each stated that the "facts and argument" in support of the claim were contained in a brief field in support of a claim for refund filed for 1917. In each instance the 1917 brief was incorporated in the claim by reference. (R. 30, 54.)

The brief filed with the 1917 claim for refund was headed "In re Claim of Bemis Bro. Bag Company for Refund of Taxes for the Year 1917 Based Upon Right to Special Assessment," and it presented in detail "Reasons why the tax should be so determined and facts upon which such reasons are based." (R. 31.) It argued (1)

that the Commissioner was unable to determine the invested capital as provided in Section 207 of the Revenue Act of 1917; (2) that because a mixed aggregate of tangible and intangible property had been paid in for stock, the Commissioner was unable to satisfactorily determine the respective values of the several classes of property at the time of payment; and (3) that the tax, if determined without benefit of Section 210, owing to abnormal conditions affecting the capital and income, would work upon the corporation an exceptional hardship. (R. 31.)

In demonstrating that invested capital could not be determined as provided in Section 207, the brief gave as "illustrations" several items acquired in past years at large costs, which had been charged to expense, but which, it was alleged, should have been capitalized. Since the vouchers of those years were no longer in existence, the exact determination of the amounts and items was impossible. (R. 33.) "An outstanding instance" relied on in the brief was certain Brand Printing Plates, acquired through the years at large cost of labor and money, all of which had been charged to expense. (R. 35.)

In demonstrating that the Commissioner was unable to determine the respective values of tangibles and intangibles paid in for stock, the brief stated, among other things, that the petitioner was incorporated on May 8, 1885, with an authorized capital

stock of $350,000, and took over a going business theretofore successfully operated as a partnership. At the date of incorporation the partnership had developed a valuable good will. The stock was issued to the partners, who transferred to the petitioner all assets, tangible and intangible. (R. 37–39.) The brief stated (R. 39):

> If the value of the respective kinds of property could be satisfactorily determined this Company would be entitled to additional invested capital under the provisions of Article 57 of Regulations 44 and T. B. R. 49 and A. R. R. 307.[1] But in this case the value of the good will acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made. As stated in A. R. R. 307, that fact entitled this Company to assessment of its taxes under Section 210.

These circumstances, and others, the brief asserted, resulted in abnormal conditions affecting capital and income, and the tax, if determined without the benefit of Section 210, would work an exceptional hardship upon the company. (R. 40, 49.) The "Relief Sought," as stated in the conclusion of the brief, was as follows: "Relying upon the sufficiency of the facts above recited to entitle

[1] It should be noted that A. R. R. 307, 3 C. B. 344, had been specifically overruled by A. R. R. 2564, II–1 C. B. 199, in March, 1923, a year and a half before the petitioner's claims for refund were filed. See also A. R. R. 6092, III–1 C. B. 169, 170.

it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917, Bemis Bro. Bag Company has heretofore presented a claim for refund for the year 1917." (R. 50.)

On October 30, 1926, the Commissioner notified the petitioner that, after careful consideration, the application for special assessment for 1919 had been denied because the evidence failed to establish that the invested capital or income was affected by abnormal conditions. The letter advised that the "claim for refund will be rejected in full" and the collector "will be officially notified of the rejection at the expiration of thirty days from the date of this letter." (R. 55.)

On November 27, 1926, the Commissioner notified the petitioner that, after careful consideration, the application for special assessment for 1918 had been denied since the audit disclosed no exceptional hardship. The letter advised that the claim "will be rejected in full," and that the collector "will be officially notified of the rejection." (R. 56.)

On December 13, 1926, the petitioner, in a letter to the Commissioner, protested "against the rejection of said claims" for the reason (1) that " The denial of said right must be based upon the use of improper comparatives as representative;" and (2) if the special assessment is denied, "then the items heretofore presented which have been improperly eliminated from invested capital should be restored to invested capital and the excess profits tax

recalculated on that basis." (R. 57–58.) The letter then entered into some discussion of several items referred to in the brief, among which were the printing equipment, and the good will referred to above. (R. 58–60.) The letter asked that, if special assessment were denied these items be restored to invested capital and the company's surplus increased accordingly. (R. 58–59.)

On April 12, 1927, and apparently in response to a request made at a conference with the Commissioner on February 23, 1927, which involved taxes for 1917 as well as 1918 and 1919, the petitioner wrote the Commissioner more detailed information concerning the printing equipment and the good will. (R. 61–68.)

On December 17, 1927 (R. 68), the Commissioner informed the petitioner that after careful consideration of its contention with respect to its taxes *for 1917*, the amount of $129,373.93 was restored to printing equipment and the balance of the $851,375.50 claimed by the petitioner, or $722,002.57, was disallowed for restoration to invested capital on the ground that it had been properly charged to expense (R. 70). As to the good will, the sum of $68,134.27 was allowed for intangibles acquired in 1885. (R. 71.) A refund for 1917 was accordingly allowed. The letter stated that the petitioner's contention for special assessment had been duly considered and no new evidence had been found to show that invested capital or net income was af-

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fected by abnormal conditions and special assessment "is, therefore, denied." (R. 72.) A recomputation of the tax liability for 1918 and 1919 taking into account the changes made for 1917 showed overassessments for those years in the sums of $14,054.18, and $9,073.15, respectively (R. 73); but these overassessments were disallowed because "not being covered by proper claims [they] are barred by the Statute of Limitations" (R. 77).

On December 22, 1927, the petitioner objected to this ruling (R. 77–83), and the Commissioner, on January 20, 1928 (R. 83), replied that in view of the fact that the basis of the claims filed for 1918 and 1919 was special assessment, and since special assessment was denied, no further action might be taken with respect to those claims. The letter stated that the case was closed on the basis of the Commissioner's letter of December 17, 1927. (R. 84.)

On January 2, 1929, the petitioner brought this action in the District Court. (R. 1.) The court held that the grounds contained in the claim for refund were not the grounds relied on in the suit and gave judgment for the United States. (R. 20–22.) The Circuit Court of Appeals affirmed. (R. 97.)

SUMMARY OF ARGUMENT

I

The claims for refund as originally filed were not sufficient to support a suit on the ground that in-

vested capital had been improperly valued. There can be no doubt that neither of the claims showed on its face that it was for error in the valuation of invested capital.

It is true that the brief attached to and made a part of the claims did set forth some facts relating to the valuation of the petitioner's invested capital, but these facts were given to support the contention that the case was one in which special assessment should be allowed. Nowhere in the claims nor in the brief, was it suggested or even intimated that the petitioner sought a revaluation of its capital.

In the light of the necessities and realities of administrative practice, this failure to make a specific claim for additions to invested capital amounted to a complete failure of the claim on that ground. When the organization of the Bureau is considered, it is clear that the claim gave the officials no notice of a claim for additions to invested capital, nor even notice of a claim broad enough to include a claim for additions to invested capital. The precise valuation of invested capital is irrelevant if special assessment is allowed and is not even a factor in determining the tax on that basis.

Moreover, the claim for special assessment did not suggest the need for a new and general audit of assets and liabilities. The original claims, including the attached brief, therefore, did not impel the Commissioner to revalue the petitioner's in-

vested capital. The point is graphically illustrated by the facts in this case.

II

If the original claims filed by the taxpayer were insufficient to support a suit on the ground that invested capital had been improperly valued, the decisions of this Court seem to make it plain that the claim could not be amended to include this ground after the expiration of the statute of limitations. In *United States* v. *Henry Prentiss & Co.*, No. 234, October Term, 1932, decided January 9, 1933, this Court held that a claim for refund based on special assessment could not be converted by amendment into a claim based on the ground of an erroneous valuation of capital.

The *Prentiss case* does not seem to be distinguishable on the ground that in the brief in support of its claim for special assessment the petitioner relied on subdivisions (a) and (c) of the statute, as well as (d). We do not believe that there is any distinction between the three subdivisions which is material in this case. The action of the Commissioner in granting or refusing special assessment under each of these subdivisions is discretionary and administrative.

The present case is plainly distinguishable from *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, decided January 9, 1933. There, the original claim for refund was general and the claim for special assessment under Section

210 of the 1917 Act was held to fall within its terms. Here, the original claim was specific; it was based on special assessment, a ground which does not include the broader and different question of the valuation of invested capital.

ARGUMENT

I

THE ORIGINAL CLAIMS WERE NOT SUFFICIENT TO SUPPORT A SUIT ON THE GROUND THAT INVESTED CAPITAL HAD BEEN IMPROPERLY VALUED

If the claims for refund, as originally filed, were sufficient to support a suit on the ground that invested capital had not been properly valued, under the rule of *United States* v. *Felt & Tarrant Mfg. Co.*, 283 U. S. 269, no question concerning the validity or sufficiency of an amendment arises. We submit that the claims as originally filed were not sufficient to support a suit on the ground that invested capital had been improperly valued.

There can be no doubt that the claims for refund on their faces did not cover the correctness of the valuation of invested capital. The sole ground there stated was that the profits taxes "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918." (R. 30, 54.) Since a claim for special assessment may not be amended so as to bring in a claim for additions to invested capital (*United States* v. *Henry Prentiss & Co.*, No. 234, October Term, 1932,

decided January 9, 1933), it necessarily follows that a claim for special assessment is not sufficient to support a suit on the ground that invested capital has been improperly valued.

There could be no possible question as to the correctness of this conclusion were it not for the brief which was attached to the claims for refund and referred to in them. (R. 31–51.) This was a printed brief which had already been filed with the Bureau in support of a claim for special assessment of 1917 taxes under Section 210 of the Revenue Act of 1917 (*infra*, p. 29). We contend that this brief was not sufficient to enlarge the original claims into claims for the revaluation of invested capital.

It is true that the brief did set forth some facts relating to the valuation of the petitioner's invested capital, but these facts were given to support the contention that the case was one in which special assessment should be allowed. They were not offered to support a refund on the ground of undervaluation of capital; as the court below said (R. 95), they were "merely incidental." The petitioner made no claim or contention that its invested capital be revalued; on the contrary, its position was, in part, that its invested capital could not be determined. (R. 32.) The facts showing that certain capital items had not been returned were given "as illustrations" by which the petitioner sought to "demonstrate" the necessity for special assessment. Far from asking for revaluation, the

brief asserted that "the vouchers of those years are no longer in existence and the exact determination of amounts and items is impossible." (R. 33.) With respect to the contention that a mixed aggregate of tangible and intangible property had been paid in for stock, the brief asserted that "the value of the goodwill acquired at the organization was in excess of the total capital stock then issued and no proper allocation of the value of the property paid in for capital stock can be made." (R. 39.) This fact, it was stated, entitled the petitioner to special assessment. At the conclusion of the brief, under the heading "Relief Sought" the taxpayer stated that it was "relying upon the sufficiency of the facts above recited to entitle it to the assessment of its Excess Profits Tax liability under the provisions of Section 210 of the Revenue Act of 1917." (R. 50.)

It is thus apparent that the facts stated in the brief were advanced for the sole purpose of supporting the claim for special assessment. Nowhere in the claims nor in the brief was it suggested, or even intimated, that the petitioner sought a revaluation of its capital. The utmost that can be said is that the question was one of those "which merely lurk in the record," and accordingly was not fairly presented to the Commissioner for his decision. Cf. *Webster* v. *Fall*, 266 U. S. 507, 511.

This failure to make claim for additions to invested capital was not a mere formal defect.

In the light of the necessities and realities of administrative practice, it amounted to a complete failure to make any claim for the revaluation of capital. This is apparent when the organization of the Bureau and the method in which the petitioner's claim was necessarily handled are considered. The petitioner's claim on its face was solely a claim for special assessment, and consequently it was routed to the "Special Assessment Section" of the Bureau. A claim for the revaluation of invested capital would have been sent to "Section A" of the "Field Audit Review Division," for that was the office in the Bureau charged with the determination of "the statutory tax on corporations." See "Report of the Joint Committee on Internal Revenue Taxation," dated November 15, 1927, v. III, p. 133. Cf. "Investigation of the Bureau of Internal Revenue," Senate Report No. 27, Part 2, 69th Cong., 1st Sess., pp. 316–317; Schmeckebier and Eble, *The Bureau of Internal Revenue,* pp. 140–142, 182–183.[2]

As a consequence of this, the claim was considered by different persons and handled in an entirely different manner and from a different point of view than would have been the case if it had stated a claim for additions to invested capital. In

[2] The organization of the Bureau has, of course, changed from time to time, and these changes are reflected in the references given in the text. There is agreement, however, that "special assessment" cases are handled in a separate unit in the Bureau.

the light of the Bureau's practice, it is clear that the claim gave the officials no notice of a claim for additions to invested capital, nor even notice of a claim broad enough to include a claim for additions to invested capital. As this Court pointed out in the *Prentiss case*—

> The two proceedings, alike in form and in consequences, are essentially diverse. * * * The grievances differ so essentially that the assertion of the one must be felt to be unrelated to any complaint as to the other.

Here, even when the claim and the brief are considered together, there can be no doubt that the sole demand asserted by the taxpayer was that the Commissioner exercise the discretion lodged in him by Congress to grant a special assessment. Such a claim is not only "unrelated" to one of error in law or fact; it is inconsistent with such a claim.[3] It can not therefore be said that the original claims, including the brief, gave fair notice of any such claim.

Moreover, as this Court said in the *Prentiss case*, "The presentation of such a claim (for special assessment), unlike the presentation of a claim of error in fact or law, does not suggest the need for a new and general audit of assets and liabilities." This is apparent from the isolation of special assessment cases in the Bureau already referred to; and it is just as true whether special assessment

[3] Cf. note 6, *infra*, p. 24.

be sought under subdivision (a) and (c) and (d) of Section 327 of the Revenue Act of 1918 (*infra*, pp. 30–31), or under (d) alone. In considering an application for special assessment (under (a) and (c), as well as (d)), there are no compensating adjustments favorable to the Government which will move the Commissioner to reconsider the value of the intangibles, or other items of the invested capital as returned by the taxpayer, or any other factors relating to the ordinary computation of the tax, and thus make the ordinary tax either less or greater; if special assessment is allowed, invested capital under the statute and the ordinary tax are irrelevant (although the amount of net income is still material).

In the consideration of a claim based on a failure to value capital correctly under Section 326 the entire tax for the year will be subject to reaudit. Cf. *Lewis* v. *Reynolds*, 284 U. S. 281. But, in this case, if the Commissioner had determined that special assessment should be allowed, there would have been no reappraisement or increase of the petitioner's invested capital. Cf. "Refunds and Credits of Internal Revenue Taxes, 1929," House Doc. No. 478, 71st Cong., 2d Sess., p. 52. As this Court pointed out in the *Prentiss case*, a demand for special assessment under subdivision (d) is not a challenge to any act of the Commissioner in the valuation of invested capital; nor is a claim under (a) or (c) any different, for it does not require an exact valuation of invested capital, but rather a finding that capital

can not be satisfactorily determined. The precise valuation of invested capital is irrelevant if special assessment is allowed and is not even a factor in determining the tax on that basis. Consequently, the original claims, including the attached brief would not impel the Commissioner to revalue the petitioner's invested capital.

Of course it is not intended to suggest that the Commissioner, in passing on an application for special assessment, does not consider the taxpayer's invested capital. One of the questions he may have to decide is whether invested capital can be determined in accordance with Section 326. But this consideration is not different from that which was necessary in the *Prentiss case* to determine whether abnormal conditions existed, for Section 327 (d) specifically refers to "abnormal conditions affecting the *capital* or income of the corporation." (Italics ours.) This is obviously quite different from a complete reaudit, appraisal, and revaluation made necessary by an application to increase invested capital. In the one case, the Commissioner must determine facts with exactness as his aim; in the other he is required only to satisfy himself that statutory invested capital can be determined, or that there are no abnormal conditions affecting capital or income.

The point is graphically illustrated by the facts in this case. The burden of the brief attached to the petitioner's original claims was that it was

entitled to special assessment on all three of the grounds provided in Section 327. The Commissioner decided that invested capital could be determined in accordance with Section 326, and that there was no abnormality. He therefore notified the petitioner that its claim for special assessment was rejected. Thereafter the petitioner sent a letter, making for the first time a specific claim for a definite increase in invested capital in the amount of $1,419,178.79. (R. 58–59.)

In examining into this claim for a revaluation of capital the Commissioner was required to proceed in a manner entirely different from that which he had adopted in passing on the original claims for special assessment. In support of its new claim the petitioner advanced certain facts not contained in the brief filed with the original claims. (R. 58–60.) Thereafter a conference was had in the Commissioner's office. (R. 61.) The Commissioner sought more detailed information, and the taxpayer supplied this information, presenting not only detailed statements from its books and records, but facts outside its books, which had not been furnished to the Commissioner or considered by him before. (R. 61–67.) The Commissioner, having considered this additional information for several months, finally arrived at the conclusion that of the million and a half dollars increase claimed by the petitioner, $197,507.20 was properly includable in invested capital. (R. 68–77.) And it should not be overlooked that this conclusion was arrived

at with respect to the claim for 1917 taxes. The claim for that year sought an increase of invested capital (R. 68), and the overassessments found for 1918 and 1919 "resulted from the adjustments made with respect to 1917" (R. 84, 73–76).

If the Commissioner had been notified in the original claims that an increase in invested capital was being asked, he would have followed the same procedure in passing on those claims as he followed in passing on the contentions of the letter of protest. We submit that the requirements of administrative procedure support our contention that the original claims failed to give fair notice of a claim for the revaluation of invested capital, and were insufficient to support a suit on that basis.

II

THE ORIGINAL CLAIMS COULD NOT BE VALIDLY AMENDED AFTER THE STATUTE OF LIMITATIONS HAD EXPIRED

If the original claims filed by the taxpayer were insufficient to support a suit on the ground that invested capital had been improperly valued, the decisions of this Court seem to make it plain that the claim could not be amended to include this ground after the expiration of the statute of limitations.[4] In *United States* v. *Henry Prentiss & Co.*,

[4] The petitioner made no contention in the court below that its original claims for refund had been amended. This is apparent from the terms of the stipulation. (R. 14–15, par. XVIII.) In its brief in the court below (p. 31) the petitioner contended that "These letters did not present any new grounds for refund."

No. 234, October Term, 1932, decided January 9, 1933, the claim for refund filed by the taxpayer stated that it was based on the ground that "this corporation failed to accrue any New York State tax in 1918, and upon the ground that it is entitled to relief under sections 327–8 of the 1918 Act." (Ex. 3, facing R. 43, No. 234, Oct. Term, 1932.) This Court held that the claim could not be converted by amendment after the statute had run into a claim for refund on the ground of an erroneous valuation of capital under Section 326 of the statute.

We do not believe that the present case is distinguishable from the *Prentiss case* in any material respect. Here the petitioner filed claims for refund of 1918 and 1919 taxes, specifying as their sole ground (if our contentions in Point I are correct) that the tax "should be assessed under the provisions of Section 327 and 328 of the Revenue Act of 1918." (R. 30, 54.) In due course the Commissioner notified the petitioner that its claims would be rejected on the ground that no hardship or abnormal conditions sufficient to warrant special assessment had been disclosed. (R. 55, 56.) On December 13, 1926, after the expiration of the statutory period for the filing of claims for refund, the petitioner wrote a letter protesting the rejection of its claims, and asserted as a reason for its protest that if special assessment was not allowed its capital should be revised by restoring certain items alleged to have been improperly eliminated.

(R. 57–60.) It is not entirely clear that such a letter may properly be regarded as an amendment to a claim for refund. But in response to this letter the Commissioner reconsidered the original claims, together with a claim for 1917 (which was apparently based on both grounds (R. 68)), and found an overassessment for 1917, based on additions to invested capital. The adjustments made in invested capital with respect to 1917 resulted in overassessments for 1918 and 1919. (R. 84.) The Commissioner notified the petitioner of this fact but stated that no refund could be made because no claim on this basis had been filed within the period of the statute of limitations. (R. 68–77.) The *Prentiss case* seems to establish that the Commissioner's conclusion was correct and that the original claim specifying as its ground the necessity of special assessment could not be converted by amendment after the statute had run into a claim for refund on the ground of undervaluation of capital.

The *Prentiss case* does not appear to be distinguishable on the ground that in the brief in support of its claim for special assessment the petitioner here relied upon the inability of the Commissioner to determine its capital (Sec. 327(a)) and upon his inability to determine the respective values of tangibles and intangibles paid for stock (Sec. 327(c)) as well as upon the existence of abnormal conditions affecting capital and in-

come (Sec. 327(d)); while in the *Prentiss case* the existence of abnormal conditions only was relied on. In the first place, the premise does not seem to be entirely correct. Although "an abnormal condition" was referred to in the claim filed in the *Prentiss case*, the claim was based on "sections 327–8" generally. The claims in the present case were based on "Section 327 and 328." Moreover we do not think that there is any distinction between subdivisions (a) and (c) on the one hand and (d) on the other which is material in this case.

Under subdivisions (a) or (c) of Section 327, the action of the Commissioner in granting or refusing special assessment is discretionary and administrative, just as it is under Section 327 (d). As stated in *United States* v. *Factors & Finance Co.*, No. 141, October Term, 1932, decided January 9, 1933, the question of whether the Commissioner is unable to determine invested capital under Section 327 (a) "in last analysis is addressed to his own conscience, * * *."[5] Moreover, as shown in *Williamsport Wire Rope Co.* v. *United States*, 277 U. S. 551, the questions under Section 328 which must be passed on whenever special

[5] Cf. *Brown's "Shamrock" Linens* v. *Bowers*, 48 F. (2d) 103 (C. C. A. 2d), certiorari denied, 283 U. S. 865, which involved a foreign corporation, and thus came within subdivision (b). It was held that the Commissioner's determination was discretionary and not subject to judicial review. The court said (p. 104) that "the fact special assessment is mandatory for a foreign corporation and permissive for a domestic one furnishes no basis for distinction * * *."

assessment is allowed under any subdivision of Section 327 are questions of administrative discretion. Consequently, when the petitioner requested special assessment under Sections 327 and 328, it invoked the discretionary authority of the Commissioner. This Court's language in the *Prentiss case,* although written with respect to Section 327 (d), is therefore directly applicable. "If this amendment is permissible," the Court said, "a request for the exercise of a discretionary jurisdiction, will have been turned after the running of the statute, * * * into a claim of error of law or fact, and hence into a controversy within the jurisdiction of a court. What at the beginning was nonjusticiable, * * * will have become justiciable at the end." The Court then said:

> An amendment so far-reaching, a metamorphosis so complete, may well be thought to destroy the identity of the claim or cause of action if the analogies of pleading in a lawsuit are to govern our decision. A declaration according to the common count for money had and received may be good though it does not tell us how the money was received or the use established. *United States* v. *Memphis Oil Co., supra.* This does not mean that a pleader who abandons the common count and states the particular facts out of which his grievance has arisen retains unfettered freedom to change the statement at his pleasure. All will then depend on the degree and kind of the depar-

> ture. A cause of action alleging as a grievance that there has been a deviation from a rule of law or the breach of a legal duty in the collection of a tax is far apart from an appeal to an administrative officer to abandon the normal rule or method and substitute another, the substitution being dependent upon administrative discretion. Overpayments there may have been in each case, yet in senses widely different. * * *

Nor is the *Prentiss case* distinguishable on the ground that the present record fails to show that the petitioner ever assented to the original valuation of its invested capital;[6] for the Court said in the *Factors & Finance case, supra,* that the "*Prentiss* ruling would have been the same if agreement had been absent." Moreover as this Court pointed out in the *Prentiss case,* there is implicit in a claim for special assessment "an abandonment of any objection that capital and income had been erroneously valued if valuation was to be ascertained according to the normal method." The

[6] We are informed by the Bureau of Internal Revenue that the Income Tax Unit by letter dated December 23, 1924, asked the taxpayer to acquiesce in net income and invested capital for 1917 and 1918, as shown in the letter, and that the taxpayer under date of January 12, 1925, acquiesced in the net income and invested capital shown in the Bureau's letter. The trial occurred before this court decided the *Prentiss case*, and these facts were not then regarded as material. Accordingly, neither party offered evidence thereof, and they do not appear in the record, but would be susceptible of proof on a new trial.

Court continued with language which seems equally applicable here:

> There is room for argument that the taxpayer, having won the privilege of a hearing on those terms, is estopped from retracting its assent and resuming the abandoned ground. *Sturm* v. *Baker,* 150 U. S. 312, 333, 334; *Davis* v. *Wakelee,* 156 U. S. 680, 689. At least its assent is equivalent to an agreement that the claim for a special assessment shall be deemed to be a distinct one from that for a revision of the values. Retraction, if ever possible, must be held to be too late when the statute of limitations has interposed a bar.

We do not believe that the analysis in the opinion in the *Factors & Finance case* of the difference between special assessment under the 1917 Act and under Section 327 (d) of the 1918 Act indicates that there is a distinction in principle between this case and the *Prentiss case.*[7] In the *Factors & Finance case* the original claim for refund was general, specifying no particular ground, and the amendment asserting the specific ground that the tax should be specially assessed under Section 210 of the Revenue Act of 1917 was held sufficient.

The receipt by the Commissioner of a general claim, as shown in the *Prentiss case,* suggests the

[7] It is not entirely clear that special assessment under the 1917 Act is properly to be regarded as anything different from special assessment under the 1918 Act, despite the difference in the wording of the two provisions. As this Court pointed out in the *Prentiss case,* the practice of the Bureau

need of a new and general audit of assets and liabilities. In making this general audit the Commissioner must necessarily determine statutory invested capital and, under Section 210 of the 1917 Act (which was involved in the *Factors & Finance case*), if he is unable to determine invested capital his attention is directed immediately to the necessity for special assessment. But upon receipt of a claim for special assessment under Section 327 of the 1918 Act no revaluation of invested capital is required, and the Commissioner, in passing on special assessment, does not, as a practical matter, consider the question of the precise valuation of capital. He may consider whether he can determine invested capital, but if he can determine it he is not concerned with its amount. The general claim, such as that involved in the *Factors & Finance case*, includes the narrower questions under Section 327 (a) and (c) of the 1918 Act; but a

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has been criticized, but there seems to be reason to say that Section 327 of the 1918 Act was worded as it was as a legislative ratification of the practice under Section 210 of the 1917 Act. Section 327 is a restatement of Article 52 of Regulations 41, under Section 210 of the 1917 Act. These Regulations were promulgated on February 4, 1918, more than a year before the passage of the Revenue Act of 1918, and the casting of Section 327 in the same terms is a clear indication of legislative approval. Cf. the effect given to Sec. 501 (c) of the Revenue Act of 1932 in *Burnet* v. *Guggenheim*, No. 283, decided Feb. 6, 1933. See "Investigation of the Bureau of Internal Revenue," Senate Report No. 27, Part 2, 69th Cong., 1st Sess., p. 280; "Refunds and Credits of Internal Revenue Taxes," House Doc. No. 43, 71st Cong., 1st Sess., pp. 48–49, 69–74.

specific claim under those sections does not include the broader and different question of the valuation of invested capital.

United States v. *Memphis Oil Co.,* No. 308, October Term, 1932, decided January 9, 1933, is distinguishable on the same ground. That case involved an original general claim and it was held that it might be amended within the limits of its generality. Here the original claim was based on narrow and specific grounds and the letter of protest, written after the statute had expired, asserted another and different specific ground.

In any event, the taxpayer's amendments were not sufficient unless they were filed before the rejection of its claims for refund. *United States* v. *Memphis Oil Co., supra.* The record in this case does not disclose when the claims for refund were rejected, and the inference, as to 1919 at least, is that the claim was rejected before the letter of protest was received. (R. 77, 78.) If the validity of the amendment depends upon the date of the rejection, the taxpayer has failed to sustain the burden of proving the facts essential to its case. *Reinecke* v. *Spalding,* 280 U. S. 227, 232; *Phillips* v. *Dime Trust & S. D. Co.,* 284 U. S. 160, 167.

CONCLUSION

The decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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FEBRUARY, 1933.

APPENDIX

Revenue Act of 1917, c. 63, 40 Stat. 300, 307—

SEC. 210. That if the Secretary of the Treasury is unable in any case satisfactorily to determine the invested capital, the amount of the deduction shall be the sum of (1) an amount equal to the same proportion of the net income of the trade or business received during the taxable year as the proportion which the average deduction (determined in the same manner as provided in section two hundred and three, without including the $3,000 or $6,000 therein referred to) for the same calendar year of representative corporations, partnerships, and individuals, engaged in a like or similar trade or business, bears to the total net income of the trade or business received by such corporations, partnerships, and individuals, plus (2) in the case of a domestic corporation $3,000, and in the case of a domestic partnership or a citizen or resident of the United States $6,000.

For the purpose of this section the proportion between the deduction and the net income in each trade or business shall be determined by the Commissioner of Internal Revenue in accordance with regulations prescribed by him, with the approval of the Secretary of the Treasury. In the case of a corporation or partnership which has fixed its own fiscal year, the proportion determined for the calendar year ending during such fiscal year shall be used.

Revenue Act of 1918, c. 18, 40 Stat. 1057, 1093—

SEC. 327. That in the following cases the tax shall be determined as provided in section 328:

(a) Where the Commissioner is unable to determine the invested capital as provided in section 326;

(b) In the case of a foreign corporation;

(c) Where a mixed aggregate of tangible property and intangible property has been paid in for stock or for stock and bonds and the Commissioner is unable satisfactorily to determine the respective values of the several classes of property at the time of payment, or to distinguish the classes of property paid in for stock and for bonds, respectively;

(d) Where upon application by the corporation the Commissioner finds and so declares of record that the tax if determined without benefit of this section would, owing to abnormal conditions affecting the capital or income of the corporation, work upon the corporation an exceptional hardship evidenced by gross disproportion between the tax computed without benefit of this section and the tax computed by reference to the representative corporations specified in section 328. This subdivision shall not apply to any case (1) in which the tax (computed without benefit of this section) is high merely because the corporation earned within the taxable year a high rate of profit upon a normal invested capital, nor (2) in which 50 per centum or more of the gross income of the corporation for the taxable year (computed under section 233 of Title II) consists of gains, profits, commissions, or other income, derived on a cost-plus basis from a Government contract or contracts made between

April 6, 1917, and November 11, 1918, both dates inclusive.

SEC. 328. (a) In the cases specified in section 327 the tax shall be the amount which bears the same ratio to the net income of the taxpayer (in excess of the specific exemption of $3,000) for the taxable year, as the average tax of representative corporations engaged in a like or similar trade or business, bears to their average net income (in excess of the specific exemption of $3,000) for such year. * * *

Revenue Act of 1924, c. 234, 43 Stat. 253, 343, 342—

SEC. 1014. (a) Section 3226 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expira-

tion of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail." (U. S. C., Title 26, Sec. 156.)

SEC. 1012. Section 3228 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 3228. (a) All claims for the refunding or crediting of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty alleged to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected must, except as provided in section 281 of the Revenue Act of 1924, be presented to the Commissioner of Internal Revenue within four years next after the payment of such tax, penalty, or sum." (U. S. C., Title 26, Sec. 157.)

Revenue Act of 1926, c. 27, 44 Stat. 9, 66—

SEC. 284. (b) Except as provided in subdivisions (c), (d), (e), and (g) of this section—

(1) No such credit or refund shall be allowed or made after three years from the time the tax was paid in the case of a tax imposed by this Act, nor after four years from the time the tax was paid in the case of a tax imposed by any prior Act, unless before the expiration of such period a claim therefor is filed by the taxpayer; and

(2) The amount of the credit or refund shall not exceed the portion of the tax paid during the three

or four years, respectively, immediately preceding the filing of the claim, or if no claim was filed, then during the three or four years, respectively, immediately preceding the allowance of the credit or refund. (U. S. C. App., Title 26, Sec. 1065.)

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